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Probate

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Guidelines and costs for the process of settling the estate of a person who had no will.

When a person dies, with or without a will, Montana laws provide a legal process to determine his or her real and personal property, and for determining the market value of the assets and their distribution to appropriate parties.

One procedure, termed probate, takes place in the district court of the county where the deceased person had residence. Probate is not required for any property the decedent held in trust, or any property held in joint tenancy with right of survivorship with another person. If the deceased had real property located in another state, an "ancillary administration" proceeding in that state may be necessary.

The Montana Legislature passed the Uniform Probate Code (UPC) that provides rules to simplify probate in a district court. Probate in Montana is not nearly as burdensome or expensive as it is in other states that have not adopted the UPC. In some states, probate can be quite costly, because an attorney and personal representative must appear before the court for approval of almost every action involved in settling an estate. In Montana, formal approval by the court is not required for any action already authorized in the UPC.

This MontGuide is designed to explain some aspects of probate. It is not intended to serve as a complete guide for probate; all details could not possibly be included. Statements apply to general situations, and solutions to specific problems relating to probate often depend upon the facts of each case.

Definitions

Probate is the administrative process of settling an estate whether the decedent died with or without a will. If appointed,

the personal representative named in your will has the responsibility of settling your estate according to the terms and provisions of it and Montana law. The personal representative may be a family member, a friend, an attorney, a corporate entity such as a bank or trust company, or a combination of these.

If you die without a will, the Montana UPC lists the order in which eligible persons may apply for appointment as a personal representative. That order is: the surviving spouse named in a will, the custodial parent of a minor decedent, other devisees (persons named in a will) of the decedent, the surviving spouse of the decedent, and other heirs (persons to receive property under intestate statutes if the decedent died without a will) of the decedent. (Further information about a personal representative is provided in MontGuide 199008 HR.)

Probate Functions

Probate proceedings have the following major functions: to determine the validity of and interpret wills; to discover, collect, manage and protect estate assets until final distribution; to settle claims of creditors; to settle federal and state obligations, if due; to distribute the decedent's property to his or her heirs according to Montana's law of intestacy (dying without a will) and devisees (those named in the will); and to provide a method of securing the legal transfer of real estate or personal property ownership (car, stocks, bonds, and so on).

Although probate may seem lengthy and detailed, it is provided by Montana law to assure that the property of the deceased is accounted for, and that all debts and taxes are paid. Someone must carry out the business of the estate and

see that the property is distributed to the designated parties.

Non-Probate Property

An appointment of a personal representative is not necessary if all property held by the decedent is non-probate property. Examples of non-probate property include: property held in joint tenancy with right of survivorship; property held in trust; life insurance payable to a named beneficiary; payable-on-death (POD) deposits at financial institutions; assets in a pension plan; individual retirement accounts; transfers on death (TOD); registrations on securities and securities accounts.

However, there are reporting requirements for these types of property for determination of Montana and federal income taxes, and perhaps federal estate taxes. (Further information about non-probate property is provided in MontGuide 199509 HR).

Types of Estate Administration

Under Montana law, probate may be administered: as an informal proceeding; as a formal procedure; by supervised administration; by collection of personal property by affidavit; or as a small estate summary administrative procedure. An estate may be opened formally and closed informally, opened informally and closed formally, or any combination.

Informal Procedure—An application for informal probate or informal appointment of a personal representative can be directed to the clerk of a district court no sooner than 120 hours after the decedent's death. If the clerk determines that all requirements of law have been met, he or she files the will and appoints the personal

representative who can then proceed to settle the estate.

Formal Proceeding—Formal probate may be necessary when no will exists, when the validity of a will may be questioned, or when parties disagree about the appointment of a personal representative or distribution of assets. With formal probate, proceedings are held before a district court judge after notice of the hearing is given to interested persons. These include heirs, devisees and any other persons or businesses having a property right in or claim against the estate.

Contestants of a will have the burden of establishing that the person who wrote it lacked testamentary intent or capacity, or was under undue influence or duress. Other circumstances for contesting a will involve fraud, mistakes or the revocation of prior wills.

In informal, formal and supervised probate procedures, creditors must be given four months to submit claims for debts after the first publication of the notice in a local newspaper. The personal representative may choose to close the estate on a formal basis six months after his or her appointment if the creditor's claim period has expired. The personal representative must have given proper notice to interested persons, filed a final account, and determined heirs and distributed property either under the provisions of the will or the laws of intestacy.

Supervised Administration—This proceeding secures administration and settlement of a decedent's estate under the continuing authority of the court. Supervised administration can occur in a formal or informal probate and extends until entry of an order approving distribution of the estate, and discharging the personal representative, or other order terminating the proceeding.

Collection of Personal Property by Affidavit—This procedure may be initiated 30 days after a person dies, if the value of the entire estate (less liens and encumbrances) does not exceed \$50,000. Any devisee or heir may collect the personal property as well as money owed to the decedent by presenting an affidavit to individuals or institutions holding the decedent's real or personal property.

Small Estate Summary Administration—If it appears from an inventory and appraisal that the value of the entire estate (less liens and encumbrances) does not exceed

the homestead allowance of \$20,000, exempt property of \$10,000, family allowance of \$18,000, cost and expenses of administration, reasonable funeral expenses and reasonable and necessary medical and hospital expenses of the last illness of the decedent—then a small-estate summary administrative procedure can be used. The personal representative, without giving notice to creditors, may immediately distribute the estate to the persons entitled and file a closing statement. The small estate administrative procedure can begin five days after the death of the decedent, and as soon as it is determined that the value of the estate does not exceed the outstanding debt.

How Long Does Probate Take?

Since the situation in every estate varies, the schedule for each may be different. If the personal representative hires an attorney to assist with probate, the attorney should provide an estimated time when the probate will be completed—in some situations, the probate can be finished within six months.

In other cases, where the estate includes assets that are difficult to value and where it faces federal estate taxation, the estate may not be closed until the audit of a federal estate tax return is complete. The Internal Revenue Service has three years after the filing of the return to complete its audit. When the formal procedure is followed, the typical time required to complete probate is about ten months.

If a personal representative chooses to close an estate on an informal basis, other than for summary administrative procedure estates, he or she would file with a court a verified statement showing that he or she has complied with the Montana laws in completing the probate no earlier than six months after the date of original appointment as personal representative. If no proceedings involving the personal representative are pending one year after filing the closing statement, the appointment of the personal representative terminates.

If an estate is not closed within two years from the date the personal representative is appointed, a Supreme Court administrator will notify a district court judge. That judge will then order the personal representative and attorney to appear before the court to disclose reasons why the estate has not been closed. If there is not just cause, the judge may order the estate be closed

within 30 days and declare that the attorney and personal representative receive no compensation.

Responsibilities of Personal Representatives

The personal representative has a duty to settle and distribute the estate of the decedent according to the terms of any probated will or the Montana laws of intestacy. The following responsibilities are typical: (A more detailed description is included in MontGuide 199008 HR.)

1. The personal representative notifies heirs and devisees of his or her appointment within 30 days.
2. Upon his or her appointment, the personal representative publishes a notice announcing his or her appointment and address, once a week for three consecutive weeks in a newspaper of general circulation in the county. The personal representative notifies creditors of the estate to present claims within four months after the first publication of the notice.
3. The personal representative files or mails an inventory of property to the district court clerk and to the Montana Department of Revenue.
4. The personal representative pays all bills and federal estate taxes (if due) from the assets of the estate and distributes the remaining assets. All expenditures must be accounted for.
5. The personal representative may close the estate on an informal basis by filing with the court a verified statement stating that he or she has complied with the provision of the probate code. The estate may be closed on a formal basis after proper notice to interested persons about the times for a hearing on the final accounting, and the formal hearing before a district court judge.

Cost of Probate

How much does probate cost? There is no standard answer to this question. It depends on the size and complexity of the estate. In 2005, the initial filing fee to begin probate is the same in every district court—\$100. The cost for copying papers in the clerk's files is \$1 per page for the first 10 pages of each file, and 50 cents thereafter. Other costs may include publication costs, appraisals, advertising expenses for sales (if any are made), sale expenses for any auctions or property sales, and insurance premiums.

The major administrative costs are the fees allowed to the personal representative and attorney for their services. Maximum fees are set by the UPC. The personal representative is entitled to a fee of three percent of the first \$40,000 of the value of the estate (as reported for federal estate tax purposes, whichever is larger), and two percent of the amount in excess of \$40,000.

The attorney's compensation cannot exceed one and one-half times the compensation allowable to the personal representative. The exception is if the district court orders payment for extraordinary services, which happens only after notice has been given and a hearing held.

Example: Joe Sanders had an estate of \$250,000. The maximum fee for his personal representative cannot exceed \$5,400, and the maximum amount of his attorney's compensation cannot exceed \$8,100.

Personal Representative and Attorney Fees

Step 1. Compute fee on first \$40,000:
 $\$40,000 \times .03 = \$1,200$

Step 2. Compute fee on amount above \$40,000:
 $(\$250,000 - 40,000 = \$210,000)$
 $\$210,000 \times .02 = \$4,200$

Step 3. Add to compute total **personal representative fee**: $\$1,200 + 4,200 = \$5,400$

Step 4. Multiply by 1.5 to derive **attorney fee**:
 $\$5,400 \times 1.5 = \$8,100$

The attorney and personal representative also have fee limitations set by law for certain functions of probate. For example, the personal representative can receive compensation of two percent of the interest passing for the termination of joint tenancies in conjunction with the probate of an estate. If the services of an attorney are engaged, he or she can charge three percent of the interest passing.

Family members who serve as personal representatives often do not charge the estate the full fee permitted by statute. Additionally, a personal representative is free to hire an attorney of his or her own choosing. Consider hiring an attorney who specializes in probate, and who is willing to charge an hourly fee for the services provided. In most estates—and especially in large estates—an hourly fee will likely result in a much lower charge than the maximum statutory percentage fees.

Protections for Surviving Relatives

The UPC exempts certain property and allowances that the surviving spouse and minor children are entitled to in preference over unsecured creditors of the estate and persons to whom the estate may be devised by will. Basic family protections are: the surviving spouse's right to an elective share, the homestead right, exempt property, and a family allowance. Any of the surviving spouse's rights may be waived, wholly or partially, before or after marriage, by a written contract, agreement or waiver signed after fair disclosure.

Surviving Spouse's Right to an Elective Share—This law is effective for the surviving spouse of a decedent domiciled in Montana. He or she has the right to take an elective-share amount that is a percentage of the combined augmented estates of the decedent and the surviving spouse. The elective share increases in percentage from three to 50 percent, based on the length of the marriage. (See Table 1.)

To protect spouses in small estates, there is a minimum

elective share amount of up to \$50,000.

The right of election of a surviving spouse, and the rights of the surviving spouse to homestead allowance, exempt property and family allowance (or any of them), may be waived, wholly or partially, before or after marriage, by a written contract, agreement or waiver signed by the surviving spouse. A surviving spouse's waiver is not enforceable if the surviving spouse proves that:

- The waiver was not executed voluntarily.
- The waiver was unconscionable when it was executed and, before execution of the waiver, the surviving spouse:
 - (1) was not provided a fair and reasonable disclosure of the property or financial obligations of the decedent,
 - (2) did not voluntarily and expressly waive, in writing, any right to disclosure of the property or financial obligation of the decedent beyond the disclosure provided, and
 - (3) did not have, or reasonably could not have had, an adequate knowledge of the property or financial obligation of the decedent.

The spouse's elective share is in addition to other benefits provided under the Uniform Probate Code, including the homestead allowance of \$20,000, personal property allowance of \$10,000, and family allowance—a maximum of \$18,000.

The Montana Uniform Probate Code provides an extensive definition of the augmented estate. The definition is not provided here because of its substantial length; a copy can be obtained from an attorney or from the Montana Codes Annotated at a local library.

In general, the augmented estate includes assets owned by the decedent at the time of death, as well as assets over which the decedent exercised control or enjoyment, and transfers made without consideration within two years prior to death.

Table 1: Surviving Spouse's Elective-share Percentage

If the decedent and the spouse were married to one another		the elective-share percentage is:
AT LEAST	LESS THAN	Percentage of aug-
	Less than 1 year	Supplemental amt. only
1 year	2 years	3%
2 years	3 years	6%
3 years	4 years	9%
4 years	5 years	12%
5 years	6 years	15%
6 years	7 years	18%
7 years	8 years	21%
8 years	9 years	24%
9 years	10 years	27%
10 years	11 years	30%
11 years	12 years	34%
12 years	13 years	38%
13 years	14 years	42%
14 years	15 years	46%
15 years or more		50%

This provision is designed to make it difficult for a decedent to intentionally disinherit a surviving spouse by giving all of his or her property away or placing it in a revocable living trust shortly before death.

Homestead Allowance—A surviving spouse of a decedent who was a resident of Montana is entitled to a homestead allowance of \$20,000. If there is no surviving spouse, each minor child and each dependent child of the decedent is entitled to a share of the homestead allowance amounting to \$20,000 divided by the number of minor and dependent children of the decedent. The homestead allowance is exempt from and has priority over all claims against the estate, including unsecured creditors of the estate and persons to whom the estate may be devised by will.

Exempt Property—In addition to the homestead allowance, the surviving spouse of a decedent who was a resident of Montana is entitled to value from the estate not exceeding \$10,000 in excess of any security interests in household furniture, automobiles, furnishings, appliances and personal effects. If there is no surviving spouse, children of the decedent are entitled jointly to the same value. If there is not \$10,000 worth of exempt property in the estate, the spouse or children are entitled to other assets of the estate to the extent necessary to make up the amount.

Family Allowance—The surviving spouse and minor children whom the decedent was obligated to support, and children who were in fact being supported by him or her, are entitled to a reasonable family allowance in cash from the estate for their maintenance during the period of probate administration. The personal

representative may determine the family allowance in a lump sum not exceeding \$18,000, or periodic installments not exceeding \$1,500.00 per month for one year. The district court may approve a larger sum.

Omitted Children—If a testator fails to provide in a will for any of his or her children born or adopted after the signing of the will, the omitted child receives a share in the estate equal in value to that which he or she would have received if the testator had died intestate. The exceptions to this general rule include:

- (1) if it appears from the will that the omission was intentional,
- (2) if the will was executed after the testator had one or more children and left substantially all his estate to the other parent of the omitted child, or
- (3) if the testator provided for the child by a transfer outside the will and the intent that the transfer be in lieu of a testamentary provision is shown by statements of the testator, from the amount of the transfer, or other evidence.

Survival Requirement—A provision of the UPC states that any person who fails to survive the decedent by more than 120 hours (five days) is considered to have died before the decedent for purpose of inheritance, homestead allowance, exempt property and intestacy. This statute eliminates the need for double probate on the same property in situations where several members of the same family are killed or injured, and die within a few days of each other. The 120-hour survival requirement applies to persons who die without a will, and to those who have a will without a specific survival clause.

Summary

Probate is a legal administrative process of settling an estate whether the decedent dies with or without a will. Although the procedure may seem lengthy and detailed, it assures that all property of the deceased is accounted for and that all debts and taxes are paid. Probate in Montana is not nearly as burdensome or costly as it is in states that have not adopted the UPC.

Disclaimer

This publication is not intended to be a substitute for legal advice. Rather it is designed to create an awareness of the Montana Uniform Probate Code. Future changes in laws cannot be predicted and statements in this MontGuide are based solely on those laws in force on the date of publication.

Acknowledgment

The Business, Estates, Trusts, Tax and Real Property Law Section, State Bar of Montana, has approved this MontGuide and recommends its reading by all Montanans.

References

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